No. 22091

United States
Court of Appeals
for the Ninth Circuit

SMITH CANNING & FREEZING CO., a corporation,

Appellant,

v.

LLOYD KRAUSE, INC., a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

FABRE, COLLINS & EHLERS
27 S.E. Third Street
Pendleton, Oregon 97801
Attorneys for Appellant

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SUPPLEMENTAL STATEMENT OF CASE

There is a concerted effort in appellee's brief to obscure and distort the controlling facts in this case. Therefore, it becomes necessary for the appellant to set the record straight by a more detailed statement of the facts.

Contrary to appellee's assertion, the record does substantiate the fact that no common carrier had trucks or equipment necessary to haul the green peas on the vines from the fields to the vining stations. Lloyd Krause, the appellee's alter ego and principal

owner, testified in this area on pages 31 through 35 of his deposition (Ex. 7). The carriers he mentions in this testimony are contract carriers and not common carriers. See Exhibits 37 and 38. With respect to others being equipped to haul for appellant, Krause testified beginning at Line 22, on Page 34 of his deposition as follows:

> Q Do you know of anybody else in this area who is equipped to haul the peas for Smith Canning and Freezing Company during these years that you hauled them?
>
> A No.
>
> Q Do you know of anybody that was equipped to do so?
>
> A No, I don't.

Again, contrary to appellee's assertion, the evidence in the record abundantly and without contradiction shows that appellee accepted the payments made by appellant in full satisfaction and discharge of appellant's obligation for the hauling services. This is made clear from the only three sources of evidence in the record. Firstly, it is proven without contradiction in the testimony of Mr. Stoddard when he testified that the weekly payments according to the billings were accepted in satisfaction of appellant's obligation and without any complaint. Tr. 59.

The second source of evidence proving that appellee

accepted appellant's weekly payments in full satisfaction of its obligations are exhibits 31 through 36. These exhibits primarily consist of the weekly billings presented by appellee, the cancelled checks of appellant in payment of these billings, and a carbon copy of the check and the detachable stub. A sample of these documents, showing the billing and payment thereof for the week ending July 25, 1964, is contained in the appendix to this reply brief.

Even a cursory examination of exhibits 31 through 36 shows that appellee billed appellant for a specific and itemized amount of money each week and that amount was paid and accepted in full satisfaction. For example, exhibit 31 shows that the appellee billed appellant seven times during the pea harvest season of 1960 and received an equal number of payments totaling $136,722.68. The billings invariably show a sum due in the far right hand column. Almost as invariably, there are corrections made on the billings and adjustments in later checks corresponding to them. And the responsive payments by appellant invariably relate to appellee's billings and the detachable stubs on the checks sent to appellee show by such explanatory statements as "hauling June 5-11, 1966" that they were intended to be accepted as payment in full for all hauling during the time specified. Hence, there

can be no doubt that appellee accepted these payments and cashed these checks in full satisfaction of appellant's obligations to make payment.

All in all, exhibits 31 through 36, covering all of the pea harvesting seasons involved in this case, show that more than 50 times appellee billed appellant for hauling services. Numerous adjustments were made and differences settled, none of which related in any way to the sums of money sought by appellee in this case. And, taking into consideration these adjustments and settlements of differences, appellant responded to these 50 odd billings by giving appellee a check in the amount of the precise sum asked for by appellee. And, in turn, appellee accepted and cashed these checks with full knowledge that they were intended as payment in full of the obligations of appellant. This should be enough to show that the record does substantiate appellant's contentions. But there is yet another source of evidence that is equally potent.

We turn now to the deposition of Lloyd Krause, being Exhibit No. 7. On page 10, line 12, he said: "I knew that the contracts read one rate and we got paid another rate." On page 15, he testified as follows:

> Q Didn't you testify that the rate you agreed to was different than the rate you put on this contract that you sent in?

A Up until 1960, yes.

Q What rate were you paid in 1960?

A $4.75.

Q All right. What were you paid in 1961?

A $4.75.

Q When did you learn that you were paid $4.75 in 1961?

A In 1961.

Q All right. Would the same be true in all subsequent years to, and including, 1965?

A Yes.

At page 17, line 1, Krause testified:

Q You are not saying that you didn't agree upon these—this rate of $4.75?

A I agreed upon it; I had to. I didn't have any choice if I was going to stay in business.

And on page 27, line 16, he said:

Q But you knew you were paid at a rate always less than the contract rate, as the contract was filed with the Public Utilities Commission?

A Yes. I am not that dumb.

Q Do you have all the records that were prepared by your employee, Mrs. Warren?

A Yes. Our attorney has them.

Q And what do those records consist of?

A I don't know for sure. They consist of the billings for the hours worked by the trucks, I guess.

There are numerous other statements of Mr. Krause in his deposition which make it abundantly clear that appellee accepted the appellant's payments, totaling more than $600,000.00, in full satisfaction for appellee's hauling services during the six years involved in this case.

SUMMARY OF ARGUMENT

The reply of appellant to the argument set forth in appellee's brief may be summarized as follows:

1. The Oregon PUC lacked statutory power or jurisdiction to regulate rates for the hauling done by appellee for appellant and its attempt to regulate was and is null and void, without legal effect and is subject to collateral attack.

2. The Oregon PUC made no determination that "competition" as intended in the statute (ORS 767.420 (4)) existed. There is no evidence in the record that any such competition existed with any common carrier. A common carrier is created and exists by reason of its "holding out"

to the public and not by its certificate of authority.

3. In Oregon parol evidence is admissable to show a written contract to be a sham where such contract was not entered into to accomplish a morally objectionable purpose.

4. The doctrines of modification, discharge, performance, release, waiver, estoppel, etc., are applicable to the contractual relationship obtaining between the parties.

ARGUMENT

The Oregon Public Utilities Commissioner had no Power to Fix Rates and the Attempt to do so is Subject to Collateral Attack

The central issue in this case is whether the Oregon PUC had authority to fix the hauling rates which appellee had to charge and appellant had to pay, thereby taking away from them the power to contractually set their own rate. It is the position of appellant that the PUC did not have such authority and that, without it, appellee's house of cards falls of its own weight and that there is no theory of law which can sustain the judgment of the District Court. In clear and unambiguous language the Oregon Legislature spelled out the authority or jurisdiction of the PUC to regulate

the rates of contract carriers such as appellee. The precise part of the statute, ORS 767.420 (4), applicable to the facts in this case is as follows:

> "* * * The Commissioner has no authority to fix rates on agricultural * * * products in transportation from the point of origin to packing or processing plants * * * when not transported in competition with common carriers or railroads."

Appellant does not contend that this language of the statute withholds from the Commissioner the power to regulate the appellee as a contract carrier. There is no doubt but that the Commissioner has such authority, including the authority to require appellee to file its contracts. Appellant contends, however, that the regulatory powers of the Commissioner could only affect it if such power included the power to fix rates. And appellant contends that the clear import of the above portion of the statute takes away from the Commissioner the power to fix the rates on the hauling done by appellee for appellant.

An administrative agency has no powers excepting those given to it by the statute. The agency does not determine the scope of its powers. In any case, it is the duty of the court to interpret the enabling statute to determine the scope of these powers as granted by the statute. This was done in Gouge v. David, 185 Or

437, 202 P2d 489 (1949), where the plaintiff was suing the defendants for malicious prosecution. The defendants had been instrumental in charging the plaintiff with the crime of selling liquor without a license from the Oregon Liquor Control Commission. The trial court granted the defendant's motion for judgments of involuntary nonsuit on the basis that the enabling statute did not grant to the Oregon Liquor Control Commission the power to grant temporary licenses while it was in the process of considering an application for renewal. The Oregon Supreme Court affirmed the lower court, after construing the enabling statutes and after applying the usual rules of statutory construction. At page 459 of its opinion, the Oregon Supreme Court said:

> "A statute which creates an administrative agency and invests it with its powers restricts it to the powers granted. The agency has no powers except those mentioned in the statute. It is the statute, not the agency, which directs what shall be done. The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare."

And, rejecting the contention that a practice of the Oregon Liquor Control Commission in granting temporary licenses could extend its powers, the court further said at page 462:

"17. Thus, there is no contention that the act was re-enacted after the purported administrative construction was made. Further, we know of nothing in the record that indicates that the legislature has been familiar with the practice upon which the appellant relies. There is no occasion, therefore, in this case for employing the recension enactment rule which takes the view that agency construction has the force of law if a statute is re-enacted after (1) the agency charged with its administration construed it, and (2) the legislative body was familiar with the construction when it re-enacted the statute: Brooks v. Dewar, 313 U.S. 354, 85 L. Ed. 1399, 61 S. Ct. 979; Helvering v. Reynolds Co., 306 U.S. 110, 83 L. Ed. 536, 59 S. St. 423; Railway Labor Executives' Assn. v. United States, 38 Fed. Supp. 818."

And at page 464 the Oregon Supreme Court said:

"22. We have carefully considered the appellant's contentions that the practice described in preceding paragraphs shows that the Commission construed the act to mean that the receipt possessed by an applicant for a renewal license is a permit which authorizes him to continue his business until the Commission takes formal action upon his application. We are convinced that if the Commission had attempted to adopt a rule or regulation to that effect it would have been invalid. Administrative rules and regulations can go no further than fill in the interstices of the dominant act. They can not overcome and override any of its provisions. Since the Commission could not have done directly what the appellant claims it attempted through

> the purported practice, it could not have done it indirectly. If the purported practice existed, it was unlawful. It is our duty to disregard it."

Thus, in Oregon, as announced in Gouge v. David, Supra, the court and not the administrative agency determines the scope of the agency's powers or jurisdiction. And this is done by the court whenever this jurisdictional question is presented, even in an indirect or collateral proceeding.

Reduced to the bone of contention, the issue in this case is whether the hauling done by the appellee for appellant was in competition with any common carrier. And this issue is centered around the meaning of "competition" in the language above quoted from the statute. The parties agreed that no common carrier actually hauled any green peas on the vines to the vining stations. Mr. Krause, as set forth in the above supplemental statement of case, testified that no other such hauling was done other than by contract carriers and that no other carrier was equipped to do the hauling required by appellant. And, most significantly, there is not one shred of evidence in the record to the effect that any common carrier ever held itself out as being in the business of hauling green peas on the vines to the vining stations. Under the authorities cited in appellant's brief, beginning at page 19 thereof, there could not possibly have been a common carrier without

this essential "holding out" to the public. Hence, there could not possibly have been any type of competition with a common carrier necessary to give the Oregon PUC power over the rates charged by appellee to appellant. The acts of the Commissioner in attempting to fix the rates were absolutely void and without legal effect. Both appellee and appellant had the right to disregard these void acts. And the evidence conclusively shows that this is exactly what they both did, only now at this late date appellee would like to breathe some life into these void and null acts.

State, ex rel Peterson v. Martin, 180 Or 459, 176 P2d 636, (1947), was a suit to enjoin the defendant from selling milk without a license issued by the appropriate administrative agency. The defendant actually had a license but the court concluded that it was not issued in the manner prescribed by the enabling statutes and that it was void. At page 475 the court said:

> "A void act is a mere nullity, and has no legal effect whatever. Booth-Kelly Co. v. Oregon etc. R. Co., 98 Or. 21, 31 193 P. 463; 12 Am. Jur., Contracts, section 10; Pollock, Principles of Contract, 10th ed., p. 8. The certificate of license, therefore, conferred upon Mr. Martin no rights whatever. Being void, no formal proceeding to revoke it was necessary. It required no disaffirmance to avoid it."

And the following is found in 2 Am. Jur. 2d 289, § 482:

> "An invalid order is not enforceable, but if for any reason an order is supposed to be invalid, it should not be ignored; the person against whom it operates should seek a modification of the order or a review. However, a void act is a mere nullity, and has no legal effect whatever, and it is not necessary to have it set aside. A void order is not binding and may be disregarded or challenged in a collateral proceeding, and it affords no protection for acts done under it."

And, again in 2 Am. Jur. 2d 303 § 495, we find the following statement to the effect that void administrative determinations are subject to collateral attack:

> "Many cases applying the rule that administrative determinations are not subject to collateral attack recognize that the rule depends upon the existence of jurisdiction in the agency, and it is generally held that, like the judgment of a court, an administrative decision made by an agency acting in a judicial or quasi-judicial capacity is open to collateral attack on the ground that the decision is void for lack of jurisdiction over the person or the subject matter—that is, made without statutory power or in excess thereof."

The above quotation from Am. Jur. 2d is fully supported by Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118, 92 L. Ed. 580, 68 S. Ct. 426, and other respectable authority there cited.

The Oregon PUC Made No Administrative Determination of the Existence of the Requisite Competition

Although appellant contends as hereinabove indicated that such act would be void, the record in this case does not show any evidence to the effect that the Oregon PUC made any administrative determination of the existence of the competition required by ORS 767.420 (4). PUC order No. 37893 dated 6-27-61, Exhibit 14, does not purport in any way or manner to make a determination of the requisite competition with a common carrier in order to give the Commissioner power to fix the rates. Properly so. That hearing and determination only had to do with the transfer of the contract carrier permit from Lloyd Krause individually to Lloyd Krause as a corporation. As conceded, the Commissioner had full power and authority to generally regulate Krause as a contract carrier in every respect. But the Commissioner did not, as expressly provided in the statute, have power to fix the rates charged by Krause when doing the type of hauling he did for appellant. Likewise, the Commissioner undertook to make no administrative determination in the letters approving the contracts that were filed by the appellee. Exhibit 13. It is clear that the enabling statutes required and now require a contract hauler to file his contracts with the Commissioner. But this affords

no basis for the Commissioner to acquire greater power or jurisdiction than is afforded to him by the statute. It is true that, in the process of examining the contracts filed by Krause, the Commissioner injected himself into the area of fixing the rate. This he did officiously, completely outside of his statutory power and his act in doing so is absolutely without legal effect and is void. However, this act of the Commissioner of approving the contracts filed with him did not rise to the dignity of an administrative determination that the requisite competition with a common carrier existed. But, rather, merely evidences the fact that the Commissioner assumed that he had the requisite power and jurisdiction. This is the inescapable conclusion to be derived from the testimony of the Commissioner's employee, Mr. Singleton. It is clear from Mr. Singleton's testimony that his interpretation of the words "competition with common carriers" in the statute bear no relationship to their clear import and the legislative intent. On direct examination (Tr. 9) he testified that the hauling of appellee for appellant was competition with common carriers. But it clearly developes in his testimony that he based this "determination" of competition on the existence in Oregon and Umatilla County of common carrier holding certificates calling for "general commodity, unrestricted." Tr. 13. Later (Tr. 16, line

3) Mr. Singleton more clearly expressed himself when he said: "Historically, we consider competition to mean those common carriers possessing the operating authority to perform the service proposed to be performed by the contract carrier under consideration." It later developed in the cross-examination of Mr. Singleton that the Oregon PUC was not in position to make any determination concerning actual competition (Tr. 19) and that it would make no difference to the so-called "determination" whether there was a common carrier in the actual business of hauling peavines with the peas in the pods to the vinery as was required and actually done by the appellee for appellant. From this testimony and all of the evidence in this case, it is clear that the Oregon PUC did not make any sort of a determination of "competition" as that term is used in the express limitation on the authority to fix rates on the hauling done by appellee for appellant. The PUC's so-called determination would actually be diametrically opposed to the definition of common carrier set forth in ORS 767.005 (5) (a), as set forth on page 19 appellant's brief.

In Miles v. Enumclaw Co-op Creamery Corp., 121 P2d 945, 12 Wn. 2d 377, the plaintiff was attempting to recover from the defendant the difference between the rate established for common carriers and the rate that the parties had agreed upon for the hauling of

cream, which agreed rate had been paid by the defendant to the plaintiff until such time as the defendant terminated the arrangement. This case is actually decisive of all of the issues involved in this appeal and the Washington court said at page 946:

> "(1) The basic question for determination is whether respondent was a common carrier. If he was such, he was bound to charge and collect the rate fixed by the order of the department of public service * * *. The respondent seems to contend that he became a common carrier ipso facto when he was granted a permit as such and complied with the law and the regulations pertaining to common carriers. With this contention, we cannot agree.
>
> "(2, 3) The state, under its regulatory powers, cannot, by legislative fiat or through its administrative officers, convert a private or contract carrier into a common carrier. * * * While what constitutes a common carrier is a question of law, the status of a carrier, as such, must be determined from his method of operation. * * *."

Hence, it is what a carrier does that determines whether or not it is a common carrier. What its certificate or permit says is immaterial. There is no evidence in the record that any carrier was in the business of holding itself out to the public as a hauler of green peas on the vine from the fields to the vining stations at any time or place material to this lawsuit. There being no evidence that a common carrier existed, there certainly could be no evidence that the appellee was in competi-

tion with a common carrier while doing the hauling for appellant.

Parol Evidence is Permissible to Show a Written Contract is a Sham Where Such Contract is not Entered Into to Accomplish a Morally Objectionable Purpose

Kergil v. Central Oregon Fir Supply Co., 213 Or 168, 323 P2d 947, and the subsequent Oregon cases following it, stand for the narrow minority rule to the effect that parol evidence is inadmissible to show a contract to be a sham when it was entered into for a morally objectionable purpose because the court would thereby aid in the accomplishment of such purpose. See the quotation from Carolina Casualty Insurance Co., v. Oregon Automobile Insurance Co., 242 Or 407, 408 P2d 198, appearing on page 53 of appellee's brief. In this same quotation the Oregon court is careful to say that at that time (1965) there was no Oregon decision on point where no morally reprehensible purpose is to be accomplished by the writing not intended to have legal effect. We now have such a case in Story v. Hamaker, 84 Or Adv Sh 145, 423 P2d 185, (1967). This case is discussed on page 32 of appellant's brief. And appellee attempts to distinguish it on pages 57 and 58 of its brief. This cannot possibly be done. It is properly distinguishable from the Kergil case in that Story v. Hamaker the refusal to enforce the sham contract

would not accomplish any moral purpose. By the same token, in the case at bar no illegal or immoral purpose was intended by the writings filed with the Oregon PUC by appellee and no illegal or immoral purpose will be accomplished by refusing to lend the court's aid in enforcing those contracts. On the contrary, the effect of enforcing those contracts will be to give appellee a large sum of money in the form of a windfall. Further, such enforcement would make valid the illegal acts of the Oregon PUC in attempting to fix the rate when the hauling was clearly not in competition with any common carrier. This would defeat the public policy of the State of Oregon and not serve it.

Also, Kergil, and the other cases following it, place considerable emphasis on the fact that the third party was misled by the sham contract. In the case at bar, the Oregon PUC was not misled in any way. Krause's permit as a contract carrier was not issued as a result of the filing of the contracts. Such permit was issued as a result of a hearing similar to that evidenced by Exhibit 14, whereby the permit was transferred to the Krause corporation. The Oregon PUC was not in any way misled into usurping the power to fix rates contrary to the express language of the statute. Its officiousness in this respect was historical. Tr. 16. Certainly, the Oregon PUC was not misled in any way in

1961, the year when appellee did not file the written contract. Likewise, the PUC could not have been misled in any way in 1964. Appellee did not file the written contract in that year until July 29, 1964. Ex. 13 (c). By this time appellant had already paid appellee more than $70,000 and the season was practically finished. Ex. 35.

Actually, it was the Oregon PUC that attempted to mislead appellant and appellee into believing that the PUC had power to fix the rate. They chose to ignore this void act. And the law permits them to do so. Appellee maintained this position until such time as the PUC, again maintaining its officious position, put the bug into appellee's ear and advised that the difference between the rate paid and the rate illegally set by the PUC could be collected from appellant. See Exhibit No. 39. There is no doubt but that, if the PUC was attempting to have appellee prosecuted under the applicable statutes for not collecting the proper rate, the tune would be different and appellee would be defending itself by saying that the acts of the PUC in attempting to fix the rate were void and without legal effect. This would be a perfect defense. In the same vein, appellant says that appellee can base no legal right on the void acts of the PUC.

The Doctrines of Modification, Discharge, Performance, etc., are Applicable

There is very little that we can add to this heading over and above what is said in appellant's brief. Appellee seems to admit that these legal doctrines would be applicable if supported by the evidence and if they do not run contrary to the law which says that a common carrier must collect the rate legally fixed by the proper administrative agency. The evidence is overwhelming that the appellee asked for and received the weekly payments of appellant in full satisfaction of all of appellant's obligations. It is equally clear under the law that the Oregon PUC had no authority to fix rates.

CONCLUSION

The relationship between appellant and appellee was purely a matter of a private contract. The Oregon PUC was misled only by its misconception of the extent of its powers. No payment due the State of Oregon was evaded. Tr. 27. The appellee is entitled to no additional compensation as a matter of fact and law. As a matter of law, there are no policy reasons for rewarding appellee. The judgment of the District Court should be reversed.

Respectfully submitted,

FABRE, COLLINS & EHLERS
Attorneys for appellant

APPENDIX

Ch. 19

To the Frozen Foods, Pendleton Oregon
Pendleton Oregon
Week Ending 7/25/64

Date	La Grande · Tic #	Bin Haul Tr #	Gross	Tare	Pendleton Net	M. F. Net	150	
7/20/64	# 6294	#12	22190	8710	13480			6459
7/20/64	# 6296	#4	21600	7700	12900			6179
7/21/64	# 6299	#12	21420	7200		13220		6332
7/21/64	# 6300	#4	21640	8700	12940			6198
7/21/64	# 24210	#12	22110	8710	13400			6419
7/21/64	# 21297	#4	21450	3660		12790		6126
7/22/64	# 02902	#12	21600	8710	12890			6174
7/22/64	# 02906	#12	22650	8680		13870		6644
								50531
	Triangle		500	475		Difference		
	Dick Hampton		211½ Hr	1074 42	1004 63	69 79		
	Anderson Hutson		259	1290 32	1206 50	83 82		
	Maybourn - China		37½	190 50	178 13	12 37		
			508 Hr	2555.24	2389.56	165.18		2389.26
	La Grande - Crawford Pit							
	Clyde Wright East		715 ¼	2632 20	2396 25	235 95		
	Don Hamann - Hamann		214½	1339 66	1017 78	70 78		
	Crosby, Hillet Home		[illegible]	1036 80	977 50	61 30		
	Royal Welde - Hass		501	1031 08	954 72	[illegible] 32		
	Stanley, Upshaw - Home		332½	1773 58	1745 38	132 20		
	Clyde Wright - North		121½	657 26	615 13	42 73		
	Harlan Crawford Ranch East		70½	322 24	352 13	51 11		
			1934 Hr	9324.72	9180.52	132.20		9186.52
	La Grande - Elmer Pit							
	Margaret Morris Morris		421 Hr	2037 62	1904 75	132 33		1904.75
	La Grande - Elmer Pit Field Haul 375							
	R Elmer Elmer		524 Hr		1965 00			
	R Elmer Brashear #2		524½		1966 75			
	R Elmer Brashear #1		265½		995 75			
			1314 Hr		4927.50			4927.50
7/13/64	La Grande 1902 gal gas @ .254 Spreck Bc. 395				77 32			77 32
7/25/64	Triangle 253 gal @ .254				643			643
7/25/64	La Grande 3017.5 gal @ .275				890 16			890 16
7/25/64	La Grande 3 ft Gal @ 45				135			135
								19,339 26
7/25/64	Gas Out Smith's 113 gal @ .254							30 79
								19,358.27

SMITH CANNING - FREEZING CO.
PENDLETON, OREGON

96-332
1232

00779

DATE July 27, 1964

AMOUNT $19,858.27

PAY THE SUM OF $19858 27/100

TO THE ORDER OF Lloyd Krause, Inc.

SMITH CANNING - FREEZING CO.

PENDLETON BRANCH
THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON
PENDLETON, OREGON

⑆1232⑈0332⑆ ? 781⑈ ⑈000198582?⑈

SMITH CANNING - FREEZING CO.
PENDLETON, OREGON

96-332
1232

00779

DATE July 27, 1964

AMOUNT $19,858.27

PAY

TO THE ORDER OF Lloyd Krause, Inc.

SMITH CANNING - FREEZING CO.

NOT NEGOTIABLE

PENDLETON BRANCH
THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON
PENDLETON, OREGON

SMITH CANNING - FREEZING CO. PENDLETON, OREGON

DATE	INVOICE NO	ACCOUNT NO	DESCRIPTION	GROSS	DISC OR DED	NET AMOUNT
			Week ending 7/25/64			

ATTACHED CHECK IS PAYMENT IN FULL FOR ABOVE LISTED ITEMS
DETACH BEFORE DEPOSITING

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in compliance with those rules.

Date: . . . . . day of November, 1967.

_____

Of Attorneys for Appellant